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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

BANQUE DE PARIS ET DES PAYS-BAS,

Petitioner,

—v.—

EXXON COMPANY, U.S.A.,
A DIVISION OF EXXON CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

This diversity case is before this Court a second time following remand in 1988 to the United States Court of Appeals for the Fifth Circuit. In 1987, the court of appeals initially found, relying upon Texas Supreme Court authority endorsing the use of sound commercial practice in construing letters of credit, that petitioner was not liable on a standby letter of credit. After the court of appeals refused to reconsider its decision on the basis of a subsequent, but unpublished, decision of one of fourteen Texas intermediate appellate courts, this Court granted certiorari.* Six months later, this Court remanded for further proceedings after respondent successfully maneuvered publication of the intermediate state court decision. The court of appeals then certified the controlling legal question to the Texas Supreme Court and expressed considerable doubt that the state intermediate appellate court's opinion accurately expressed the law of Texas. The Texas Supreme Court, however, refused to answer the certified question. In December 1989, the court of appeals then reversed its 1987 carefully-reasoned decision solely because it felt *bound* to defer to the holding of the state intermediate appellate court.

The Questions Presented:

(1) Is the Fifth Circuit's deeply-entrenched policy in diversity cases of virtually complete and inflexible deference to the holdings of state intermediate appellate courts (i) contrary to the principles established in *Commissioner* v. *Estate of Bosch*, 387 U.S. 456, 465 (1967), and other decisions of this Court, and (ii) in conflict with *McKenna* v. *Ortho Pharmaceutical Corp.*, 622 F.2d 657, 661-63 (3d Cir.), *cert. denied*, 449 U.S. 976 (1980)?

(2) Has *West* v. *American Tel. & Tel. Co.*, 311 U.S. 223, 237 (1940) been so eroded that it should now be formally overruled?

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* *Exxon Co., U.S.A.* v. *Banque de Paris et des Pays-Bas*, 485 U.S. 1020, *vacated and remanded*, 109 S. Ct. 299 (1988).

RULE 29.1 LISTING

The parent and non-wholly-owned subsidiaries of petitioner are listed in the Appendix ("App."), at pages 60-67.

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BANQUE DE PARIS ET DES PAYS-BAS,

Petitioner,

—v.—

EXXON COMPANY, U.S.A.,
A DIVISION OF EXXON CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Banque de Paris et des Pays-Bas (now known as Banque Paribas) (the "Bank") hereby petitions for a writ of certiorari and asks this Court to vacate the judgment below and remand the case for further consideration consistent with the principles of *Commissioner* v. *Estate of Bosch*, 387 U.S. 456 (1967).

OPINIONS BELOW

The 1986 opinion of the district court (App. 46) is not officially reported, but is reprinted at 828 F.2d 1127. The 1987 opinion of the court of appeals (App. 36) ordering judgment in favor of the Bank is reported at 828 F.2d 1121. This Court's order (App. 34) vacating that judgment and remanding the case to the court of appeals for further consideration

is reported at 109 S. Ct. 299. The March 27, 1989 and May 16, 1989 opinions of the court of appeals (App. 22, 11) respecting certification to the Texas Supreme Court are reported at 867 F.2d 1524 and 874 F.2d 234. The September 20, 1989 decision of the Supreme Court of Texas (App. 10) declining to answer the certified question is not officially reported. The December 8, 1989 opinion of the court of appeals (App. 1) reversing its 1987 decision and granting judgment in favor of respondent Exxon Company, U.S.A. ("Exxon") is reported at 889 F.2d 674.

JURISDICTION

The judgment of the court of appeals sought to be reviewed was entered on December 8, 1989. On January 12, 1990, Exxon filed a motion with the court of appeals relating to attorney's fees which the court construed to be a petition for rehearing and which, on February 8, 1990, the court of appeals denied as untimely. *See* App. 9. On December 26, 1989, the Bank timely filed a suggestion for rehearing en banc which, on April 13, 1990, the court of appeals construed to be a petition for rehearing and denied. App. 52. On February 13, 1990 and March 30, 1990, this Court entered orders (App. 59, 58) enlarging the Bank's time for filing a petition for a writ of certiorari to and including May 7, 1990. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1982).

STATUTE INVOLVED

The Rules of Decision Act, 28 U.S.C. § 1652 (1982), provides:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

STATEMENT OF THE CASE

This case raises important and systemic institutional questions in the administration of the doctrine announced in *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938). The petition is not concerned with whether the court of appeals correctly interpreted the relevant (*i.e.*, Texas) state law it was required to apply. Rather, the petition presents, in dramatic form, a question of wide-ranging, institutional importance: whether the Fifth Circuit's now deeply-entrenched policy in diversity cases of inflexible deference to the decision of a single state intermediate appellate court disregards important principles established by this Court for determining how to ascertain the content of state law?

Exxon's action against the Bank for wrongful dishonor of a letter of credit was commenced in 1982 in a Texas state court, and was removed to the United States District Court for the Southern District of Texas on the basis of diversity of citizenship. 28 U.S.C. §§ 1332, 1441 (1982); App. 13. The Bank disclaimed liability on the letter of credit because Exxon did not present the documents required by the credit within the time specified by the credit's express expiry date. After extensive discovery, both sides moved for summary judgment. App. 46. In 1986, the district court granted Exxon's motion (App. 46, 51), in a brief opinion devoid of any analysis of the law applicable to letters of credit.

The court of appeals reversed. The court's careful and elaborate opinion, written by Judge Rubin, drew heavily on well-established principles of Texas letter of credit law. The court stated that there was "no uncertainty on the face of the letter as to its expiration date," a date which was "as certain as words permit." App. 43. The court noted that "[g]ood banking practice and common sense require that the bank's liability terminate at a date certain." *Id.* The court concluded:

> In letter-of-credit transactions, as in many other legal areas, certainty of result and practicality of performance

> by laymen are of paramount importance. As Exxon asserts, it was required to comply with "whatever requirements that [the Bank] established" "to the last comma, the last semicolon, . . . and, if they [did] that, they [were] entitled to be paid." It follows that, if Exxon did not do that, it was not entitled to be paid.

App. 45. The court held that the letter of credit's clearly-stated expiration date controlled. *Id.* Judge Garza dissented. *Id.* Exxon's suggestion for rehearing en banc was denied on December 8, 1987. App. 54.

Shortly after the court of appeals' decision, one of the fourteen intermediate appellate courts in Texas issued a brief, unpublished opinion in a case involving another letter of credit that, by its terms, also expired before the beneficiary presented the required documents. *Kerr Constr. Co.* v. *Plains Nat'l Bank*, 753 S.W.2d 181 (Tex. App.—Amarillo 1987, writ denied). The unpublished opinion did not discuss Judge Rubin's opinion or substantively address any of the decisions of the Texas Supreme Court on letters of credit. The *Kerr* court, however, ruled that the stated expiry date in that letter of credit did not control. *See* App. 6-7. Exxon's subsequent motion to the court of appeals to file a second petition for rehearing was denied on the ground that an unpublished opinion lacks any precedential value in Texas. Tex. R. App. P. 90(i); App. 56, 57.

In March 1988, Exxon filed a petition for certiorari in this Court and simultaneously embarked on a truly extraordinary effort to extract some litigation advantage from the Texas state courts. *Kerr* was then pending before the Texas Supreme Court on an application for a writ of error. Exxon entered the *Kerr* litigation as an "amicus curiae" seeking, *inter alia*, publication of the intermediate appellate court's opinion.

In April 1988, this Court granted certiorari in this case, apparently to consider what effect, if any, unpublished opinions, such as *Kerr*, should have in guiding federal courts in determining the content of state law in diversity cases.

App. 35. Two days later, the Texas Supreme Court denied the application for a writ of error in *Kerr* and refused to order publication of the intermediate appellate court's opinion. In May 1988, the Texas Supreme Court denied yet another motion by Exxon to obtain publication of *Kerr*. Exxon then "appealed downwards" to the intermediate appellate court and filed a motion there to obtain publication of that court's November 1987 opinion. In July 1988, the intermediate appellate court ordered its earlier opinion published, and in October 1988, this Court vacated the 1987 judgment of the court of appeals in this case and remanded for further consideration in light of *Kerr*. App. 34.

On remand, the court of appeals expressed clear doubts that the *Kerr* opinion, albeit now published, accurately stated the law of Texas:

> [I]t is not clear whether or not the Texas Supreme Court would consider *Kerr* a proper elaboration of Texas law on letters of credit. Were it to be confronted with the issue raised in *Kerr* in a later case important to the jurisprudence of the state, the Texas Supreme Court might grant review and correct whatever error it saw in *Kerr*.

App. 25-26; *see also* App. 2; App. 14. The court of appeals thereupon certified the controlling state law issue to the Texas Supreme Court. App. 11.

On September 20, 1989, the Texas Supreme Court entered a terse, one sentence order declining to answer the question certified because "the question certified is dependent upon issues of fact." App. 10.

The court of appeals thereafter simply reversed its October 1987 decision, based on the published *Kerr* opinion which the court had refused to consider when it existed but was unpublished. Although expressing puzzlement at the action of the Texas Supreme Court (App. 3), the court of appeals now concluded the opposite of what it had previously determined: that "under state law the letter of credit had not expired when presented to the issuer." App. 2. *Kerr provided the sole*

basis for the court's abandonment of its own careful prior opinion. Instead of examining all relevant sources of Texas law in an effort to determine how the Texas Supreme Court would resolve the question on the merits, the court of appeals mechanically deferred to the brief, unreasoned opinion in *Kerr*, concluding that "*Kerr* is binding on this court" unless the Bank could "convince us that the Texas Supreme Court thinks *Kerr* is wrong." App. 5, 4. The court's abdication to *Kerr* was quite complete. For example, from the *Kerr* court's failure even to consider or discuss sound commercial policy and any general principles of Texas letter of credit law, the court of appeals now concluded:

> [W]e too must resist the view of sound commercial policy on which we relied in part in [our October 1987 decision in favor of the Bank]. . . . As the *Kerr* decision makes clear, the distinctive aspects of letters of credit are of themselves irrelevant to deciding which provision of the letter should be given controlling effect.

App. 7.

The Bank's suggestion for rehearing en banc was filed on December 26, 1989 and was denied nearly four months later on April 13, 1990. App. 52.

REASONS FOR GRANTING THE WRIT

The Bank fully recognizes that a claim that a diversity court has misconstrued the applicable state law presents no ground for invoking this Court's certiorari jurisdiction. *See* Sup. Ct. R. 10. But *precisely* because this is so, this Court must ensure that the lower federal courts proceed in a correct manner to determine state law. That consideration should impel this Court to grant certiorari again in this case.

The Fifth Circuit's policy is to give conclusive effect to a single holding of any intermediate appellate court unless a litigant can somehow demonstrate the negative; *i.e.*, that the holding is not the law of the state. Such an inflexible rule of

deference, however, turns *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938), which was intended to ensure parity of treatment between state and diversity courts, on its head. Rather than achieving the desired parity, the Fifth Circuit's policy means that, in the federal diversity court, litigants receive a brand of justice substantially inferior to that accorded in the state court. Furthermore, the Fifth Circuit's approach is in direct conflict with that of the Third Circuit, which requires the diversity court to predict how the state's highest court would decide. The Third Circuit's policy prohibits absolute deference to an intermediate appellate court opinion.[1]

This petition presents a salutary occasion for the exercise of this Court's guidance because it so graphically illustrates the consequences of the Fifth Circuit's policy. In this case the court of appeals abandoned its own, reasoned opinion that focused upon and analyzed the key decisions of the highest state court. It did so solely on the basis of an intervening appellate court opinion—an opinion that was laconic and unreasoned, an opinion that the court of appeals itself had earlier doubted expressed the law of Texas, and an opinion whose authoritative character is restricted to but *one* of fourteen regional districts.

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1 The conflict between the Third and Fifth Circuits most clearly demonstrates the dramatically different processes by which diversity courts determine and apply state law. Other circuits have used a variety of conflicting approaches. *E.g.*, *Harris* v. *Lukhard*, 733 F.2d 1075, 1082 (4th Cir. 1984) (lower court opinions not controlling); *Entron, Inc.* v. *Affiliated FM Ins. Co.*, 749 F.2d 127, 132 (2d Cir. 1984) (intermediate state court opinion binding); *Williams, McCarthy, Kinley, Rudy & Picha* v. *Northwestern Nat'l Ins. Group*, 750 F.2d 619, 624 (7th Cir. 1984) (intermediate court opinion not binding); *Silverberg* v. *Paine, Webber, Jackson & Curtis, Inc.*, 710 F.2d 678, 690 (11th Cir. 1983) (intermediate court decision binding); *American Triticale, Inc.* v. *Nytco Servs., Inc.*, 664 F.2d 1136, 1143 (9th Cir. 1982) (obligated to follow intermediate court decision); *Ruth* v. *Bituminous Casualty Corp.*, 427 F.2d 290, 292 (6th Cir. 1970) (obligated to follow intermediate court decisions).

A. THE CONSEQUENCES OF THE FIFTH CIRCUIT'S POLICY

The court of appeals' unchallengeable deference to the holding of the Texas intermediate appellate court decision in this case is no aberration; it reflects deeply-entrenched circuit policy. The Fifth Circuit has consistently interpreted *Erie* as requiring near absolute deference to *any* pertinent intermediate appellate court decision that has addressed the particular question. *E.g.*, *Sifers* v. *General Marine Catering Co.*, 892 F.2d 386, 397 (5th Cir. 1990); *Colorado Interstate Gas Co.* v. *Hufo Oils*, 802 F.2d 133, 140-41 (5th Cir. 1986); *Birmingham Fire Ins. Co.* v. *Winegardner & Hammons, Inc.*, 714 F.2d 548, 550 (5th Cir. 1983); *Mott* v. *Mitsubishi Int'l Corp.*, 636 F.2d 1073, 1074 (5th Cir. Unit A Feb. 1981). For example, in *Birmingham*, the Fifth Circuit stated:

> That the [Texas intermediate appellate] court which decided *Miller* is not the highest court of Texas does not free this Court to disregard its holding. On the contrary: We consider ourselves *Erie*-bound to apply the law as it has been interpreted by the highest state court to rule on the matter. . . . Often, an intermediate appellate court's view of the applicable law is authoritative. . . .
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> * * *
>
> Of course, if we were convinced from specific tangible circumstances that the supreme court of the state would hold differently from the lower state court . . . we would defer less to the opinion of the intermediate court.

714 F.2d at 550.

What is unusual in this case is that the consequences of the court's rigid adherence to intermediate appellate court decisions are not speculative. Prior to the belated publication of *Kerr*, no reported decision by any Texas court considered the letter of credit issue presented by the facts of this litigation. In its October 1987 opinion, the court of appeals considered itself free to consult Texas Supreme Court and intermediate

appellate court letter of credit cases, Chapter 5 of the Texas Business and Commerce Code, other federal and state court letter of credit decisions, scholarly writings, and the fundamental commercial policies that give letters of credit commercial vitality as security instruments. Having then considered all the available data extant at that time as to how the Texas Supreme Court would determine the issue, the court sustained the Bank's position in this case. The court even held firm in its decision while *Kerr* was an unpublished opinion. But following publication of *Kerr*, the Fifth Circuit completely abandoned itself to *Kerr*.

The change in the court's approach to determining state law was dramatic. In the December 1989 opinion, the very inquiries that were the center of the court's earlier opinion are now completely missing: there is no analysis of the broad panoply of legal principles governing letters of credit enunciated by the Texas Supreme Court; there is not even a passing reference to Chapter 5 of the Texas Business and Commerce Code or the 1974 revision of the Uniform Customs & Practice for Documentary Credits, to which the Bank's letter of credit was expressly subject. Indeed, so strongly did the court internalize the need for surrendering its own judgment that it felt obliged to view the lack of discussion of considerations of sound commercial policy in *Kerr* as now forbidding even the barest of such considerations.[2]

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2 The court of appeals' sudden abandonment of any consideration of sound commercial practice is a particularly striking example of the bizarre results of the court's rigid policy of deference to intermediate appellate court decisions. There is simply no reason to believe that *Kerr* reflects the jurisprudence of the Texas Supreme Court in this respect. In dealing with letters of credit, the Texas Supreme Court has repeatedly *embraced*—not rejected—considerations of sound commercial policy. *See Philipp Bros., Inc.* v. *Oil Country Specialists Ltd.*, No. C-8191, slip op. (Tex. Jan. 17, 1990) (emphasizing the need to "maintain the strong commercial viability of letters of credit"); *CKB & Assocs., Inc.* v. *Moore McCormack Petroleum, Inc.*, 734 S.W.2d 653, 655 (Tex. 1987) (same); *Fina Supply, Inc.* v. *Abilene Nat'l Bank*, 726 S.W.2d 537, 541-42 (Tex. 1987) ("To engage its credit, a bank must be able to predict with certainty the possible range of its liability and must

Even more striking about the court of appeals' great deference to the state intermediate appellate court decision—and more harmful to the diversity litigant—is that the court's action accords *Kerr* far greater status than it would have received if this litigation had remained in the state court. A decision by a single Texas intermediate appellate court does not, of course, constrain the Texas Supreme Court in any way. *E.g.*, *Texas Employers Ins. Ass'n* v. *Wermske*, 349 S.W.2d 90, 94 (Tex. 1961). Indeed, such a decision does not even constrain the intermediate appellate courts in any of the thirteen other Texas judicial districts. *E.g.*, *Calvary Temple* v. *Taylor*, 288 S.W.2d 868, 871 (Tex. Civ. App.—Galveston, 1956, no writ). Quite plainly, if manifest injustice to and discrimination against diversity litigants are to be avoided, the federal courts must be accorded at least the same flexibility as the courts of the state in which they are sitting in ascertaining the state law to be applied in diversity matters. *See* J. Friedenthal, M. Kane & A. Miller, *Civil Procedure* 220-21 (1985).

B. THIS COURT'S DECISIONS ON DETERMINING STATE LAW

Erie R.R. v. *Tompkins*, 304 U.S. 64, 78 (1938), requires a diversity court to apply state law as enunciated by the state's highest court. Where the highest court of the state has not addressed the particular issue, however, the diversity court is required to predict what the highest court of the state would decide if the issue were presented to it:

> [T]he State's highest court is the best authority on its own law. If there be no decision by that court then fed-

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be assured that the scope of this liability will not be altered."); *Westwind Exploration, Inc.* v. *Homestate Sav. Ass'n*, 696 S.W.2d 378, 380-81 (Tex. 1985); *Temple-Eastex, Inc.* v. *Addison Bank*, 672 S.W.2d 793, 795 (Tex. 1984); *Republic Nat'l Bank* v. *Northwest Nat'l Bank*, 578 S.W.2d 109, 116 (Tex. 1978) ("Having fully considered the policy behind our commercial statutes along with all relevant authorities, we conclude as a matter of law that the instrument before us is a valid, intra vires, and enforceable letter of credit.").

> eral authorities must apply what they find to be the state law after giving "proper regard" to relevant rulings of other courts of the State. In this respect, it may be said to be, in effect, sitting as a state court.

Commissioner v. *Estate of Bosch*, 387 U.S. 456, 465 (1967); *see also Bernhardt* v. *Polygraphic Co. of Am.*, 350 U.S. 198 (1956); *King* v. *Order of United Commercial Travelers of Am.*, 333 U.S. 153 (1948).

The court of appeals showed no sensitivity to this Court's decision in *Bosch* and other recent cases or to the obvious consequences of its policy that provides diversity litigants in the Fifth Circuit far less justice than they would receive in the state courts. Instead, the court simply cited this Court's decision in *West* v. *American Tel. & Tel. Co.*, 311 U.S. 223 (1940), one of several decisions of this Court decided in the immediate wake of *Erie* on the weight to accord state intermediate appellate court decisions.[3] The court below understood *West* as mandating deference to the intermediate appellate court unless there was a clear determination that the intermediate court's holding was not the law of the state. Language in *West* taken in isolation can be so understood. But to that extent *West* has not survived the test of time, nor should it have.

West is one of several decisions referred to by Judge Henry Friendly as "the excesses of 311 U.S. as to the respect that federal judges must pay to decisions of lower state courts." Friendly, *In Praise of Erie and of the New Federal Common Law*, 39 N.Y.U.L. Rev. 383, 400 (1960). These decisions suggested some rule of inflexible deference to *any* state court expression of state law; and to that extent they were subject to unremitting criticism by commentator after commentator. *E.g.*, Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 Yale L.J. 267, 290-95 (1946); Corbin, *The Laws of the Several States*, 50 Yale L.J.

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3 *See Fidelity Union Trust Co.* v. *Field*, 311 U.S. 169 (1940); *Six Companies* v. *Joint Highway Dist.*, 311 U.S. 180 (1940); *Stoner* v. *New York Life Ins. Co.*, 311 U.S. 464 (1940).

762, 766-77 (1941); Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 510 (1954). This Court subsequently articulated an approach far more responsive to the real underpinnings of *Erie*, and *Bosch* is generally regarded as a retreat from the rigid rule announced in the 311 U.S. cases.[4] Today it is well understood that

> the federal judge need no longer be a ventriloquist's dummy. Instead he is free, just as his state counterpart is to consider all the data the highest court of the state would use in an effort to determine how the highest court of the state would decide. This is as it should be. Unless this much freedom is allowed the federal judge, the Erie doctrine would simply have substituted one kind of forum-shopping for another.

C. Wright, *Law of Federal Courts* 373-74 (4th ed. 1983) (footnote omitted).

C. CONFLICT WITH THE THIRD CIRCUIT

The imperative need for this Court's guidance becomes even clearer when the Fifth Circuit's inflexible deference to intermediate appellate court holdings is contrasted with the approach of the Third Circuit, which consistently holds that it is not bound by decisions of state intermediate appellate courts. *See, e.g., Aloe Coal Co.* v. *Clark Equip. Co.*, 816 F.2d 110, 118-19 (3d Cir.), *cert. denied*, 484 U.S. 853 (1987); *Safeco Ins. Co.* v. *Wetherill*, 622 F.2d 685, 688-89 (3d Cir. 1980); *McKenna* v. *Ortho Pharmaceutical Corp.*, 622 F.2d 657, 662 (3d Cir. 1980); *National Sur. Corp.* v. *Midland Bank*, 551 F.2d 21, 28-31 (3d Cir. 1977). Instead, the ultimate focus of the Third Circuit is on how the highest state court *would* decide the issue—and not, as in the Fifth Circuit, on how an intermediate appellate court *did* decide the issue.

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4 *See, e.g.*, J. Friedenthal, M. Kane & A. Miller, *Civil Procedure* 218-20 (1985); 19 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4507, at 87-91 (1982); 1A Part 2 J. Moore, W. Taggart, A. Vestal, J. Wicker & B. Ringle, *Moore's Federal Practice* ¶ 0.307[2], at 3086-88 (2d ed. 1989).

This is illustrated by the *McKenna* decision where, after referring to *Bosch*, the Third Circuit stated that

> disposition of such cases must be governed by a *prediction of how the state's highest court would decide* were it confronted with the problem. Although some have characterized this assignment as speculative or crystal-ball gazing, nonetheless it is a task which we may not decline.

622 F.2d at 661-62 (footnote omitted) (emphasis added). This means that *all* relevant sources of state law must be consulted:

> [A] federal court attempting to forecast state law *must* consider relevant state precedents, analogous decisions, considered dicta, scholarly works, and any other reliable data tending convincingly to show how the highest court in the state would decide the issue at hand.

Id. at 663 (emphasis added). The Third Circuit recognizes that mechanical application of selected state opinions, instead of considering all the pertinent authorities, will distort the diversity court's determination of state law:

> [B]lind adherence to state precedents "without evaluating the decision[s] in the light of other relevant data as to what the state law is, will result in injustice and a perversion of the state law which the federal court sets out to apply."

Id. (quoting 1A Part 2 J. Moore, W. Taggart, A. Vestal, J. Wicker & B. Ringle, *Moore's Federal Practice* ¶ 0.309, at 3112 (2d ed. 1979) (footnote omitted)). Moreover, it will also cause harm to the diversity litigant:

> A diversity litigant should not be drawn to the federal forum by the prospect of a more favorable outcome than he could expect in the state courts. But neither should he be penalized for his choice of the federal court by being deprived of the flexibility that a state court could reasonably be expected to show.

Becker v. *Interstate Properties*, 569 F.2d 1203, 1206 (3d Cir. 1977), *cert. denied*, 436 U.S. 906 (1978) (footnote omitted).

The Third Circuit's position stands in marked contrast to that of the Fifth Circuit. As noted, the fact that this Court will not review specific claims that state law has been misconstrued requires the Court to be especially sensitive when questions of process malfunctions are raised. This petition provides an opportunity for the Court to provide important guidance to the federal courts as to the process by which the *Erie* obligation is discharged. The considerations that should inform that process were aptly described by Professor Arthur Corbin almost fifty years ago:

> When the rights of a litigant are dependent on the law of a particular state, the court of the forum must do its best (not its worst) to determine what that law is. *It must use its judicial brains, not a pair of scissors and a paste pot.*

Corbin, *The Laws of the Several States*, 50 Yale L.J. 762, 775 (1941) (emphasis added). Only through the wise and experienced use of *all* the available sources is a diversity court able to give effect to the *Erie* rule which "remains a vital expression of the federal system and the concomitant integrity of the separate States." *Ferens* v. *John Deere Co.*, 110 S. Ct. 1274, 1280 (1990). The Fifth Circuit's mechanical adherence to state intermediate appellate court decisions, with blinders on as to other relevant state law authority, is radically at variance with this aim.

CONCLUSION

The petition for a writ of certiorari should be granted, the December 8, 1989 judgment of the Fifth Circuit should be vacated, and the case remanded with instructions to apply the principles of *Bosch*.

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